INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	10

CITATIONS

CASES:

Banning v. *United States*, 130 F. 2d 330, certiorari denied, 317 U.S. 695	8
Crain v. *United States*, 162 U.S. 625	9, 10
Sawyer v. *United States*, 202 U.S. 150	8
Simon v. *United States*, 123 F. 2d 80, certiorari denied, 314 U.S. 694	8
United States v. *Tandaric*, 152 F. 2d 3, certiorari denied, 327 U.S. 786	8

STATUTE:

18 U. S. C. 641	2

MISCELLANEOUS:

Rule 52, F. R. Crim. P.	10

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 159

FREDERICK CHARLES WITT, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 220-222) is reported at 196 F. 2d 285.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1952 (R. 223). On May 28, 1952, the time within which to file a petition for a writ of certiorari was extended by order of Mr. Justice Douglas to and including June 20, 1952. On June 16, 1952, this period was extended by Chief Justice Vinson to and including June 28, 1952. The petition was filed on June 25, 1952. The jurisdiction

of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court was correct in ruling that, if petitioner took the stand before the jury, he would be open to cross-examination for impeachment purposes, and could not have his testimony limited to the voluntariness of his confession.

2. Whether the trial court's judgment, reciting that petitioner was convicted of the inconsistent offenses of theft and embezzling, as charged in the indictment, prejudiced petitioner where only the issue of theft was submitted to the jury.

STATEMENT

On March 14, 1951, an indictment was returned in the United States District Court for the District of Hawaii, charging that petitioner did "knowingly, wilfully, unlawfully and feloniously embezzle, steal, purloin and knowingly convert to his use and the use of another," certain Government property of the value of $321.02, in violation of 18 U.S.C. 641 (R. 3).[1] Petitioner was tried be-

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[1] 18 U.S.C. 641 provides in pertinent part:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, * * * any record, voucher, money, or thing of value of the United States * * *
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; * * *.

fore a jury and found guilty "as charged" (R. 4). Imposition of sentence was suspended, and petitioner was placed on probation for two years, and fined the sum of $500 (R. 5-6). On appeal, the judgment was affirmed (R. 217-223).

The evidence adduced at the trial may be summarized as follows:

On December 26, 1950, the date of the alleged offense, petitioner was employed at the Pearl Harbor Navy Yard as a teletype mechanic (R. 99, 135-136). Witness Quon (R. 98) testified that on the date in question, petitioner, while driving the Navy service truck which petitioner regularly drove in the course of his work, picked him up inside the yard and then drove outside the yard to the rear of the house of one Cavallo. Petitioner asked Quon to help unload certain boxes and equipment, which Quon identified in court. (R. 98-104.) Three members of the Naval Base police testified that they recovered certain equipment, appearing to be diesel engine parts, from Cavallo's private automobile parked in the rear of his home. All three witnesses identified the equipment in court as being the same as that recovered by them. (R. 27-41, 42-44, 44-61.) Witness Jo Ann Cavallo testified that she was present at her residence when petitioner and Quon arrived in the navy truck and unloaded the parts into her husband's private car (R. 96-98). Other witnesses identified the recovered property by numbers and marks as having

come from Shop 38, Pearl Harbor Navy Yard (R. 62-84, 85-96) and testified as to the value of the property (R. 92-93).

The Government sought to introduce into evidence petitioner's alleged confession to F.B.I. agent Weiskirch (R. 104, 107). Petitioner objected and requested a hearing on the question of the voluntariness of the confession outside the jury's presence (R. 107-108).[2] Thereupon the jury was dismissed (R. 108) and agent Weiskirch (R. 104-134, 156-194) took the stand and testified as follows:

On December 27, 1950, he proceeded to the Pearl Harbor Naval Base where he contacted Captain Festerling of the Base Naval Police for the purposes of conducting an investigation concerning the alleged theft of certain Government property (R. 104). Weiskirch identified petitioner in court (R. 107) as the man who came to Captain Festerling's office at the police department at approximately 11:00 a.m. Thereafter, the agent interviewed petitioner until 12:45 p.m., during which time petitioner made certain admissions to him. Before beginning the interview, the agent advised petitioner that he need not make any statement whatsoever; that whatever he

[2] Petitioner's other ground of objection, that the prosecution had failed to establish the corpus delicti in that there was no evidence of a taking, was overruled by the trial court (R. 113).

said could be used in court; and that he was entitled to be represented by counsel (R. 107, 115).

On cross-examination, Weiskirch flatly denied that he had made any promises to petitioner or made any statements concerning probation. He stated that petitioner's attitude during the interview was "humble", and "quite apologetic" (R. 129) and that, to his knowledge, petitioner understood the admonition concerning his constitutional right not to incriminate himself (R. 124-132).

Petitioner then took the stand and testified that (R. 135-156) on the morning of December 27, 1950, around 8:00 a.m., he proceeded, as requested, to the police station inside the Naval Yard, where he waited approximately an hour and one-half before seeing Captain Festerling. He made no incriminating statements to Festerling during the one-half hour interview with him. After the lapse of an hour and a half, during which he remained alone, he was escorted into an office where agent Weiskirch identified himself and asked petitioner to repeat the story he had earlier told to Captain Festerling (R. 143-144). Petitioner stated that Weiskirch told him that he wanted the right answers and that if he, petitioner, did not give them, the F.B.I. would find out anyway (R. 145). After the lunch hour, the interview was resumed. Petitioner testified that he made the incriminating statements after Weiskirch told him that he could not have a lawyer, and that if he did not talk, he would be locked up for at least six months (R.

148). Petitioner alleged that he was nervous, trembling and "really good and scared" (R. 148). On cross-examination, petitioner admitted that before the luncheon recess, Weiskirch had informed him that he could have a lawyer if he wanted one (R. 149), but denied that he had been told that he need not make a statement (R. 150). Petitioner maintained that he thought he was restricted during the lunch hour because he was told to "stand by" by Weiskirch, although he proceeded unaccompanied to a dock near the police station where he remained until 1:30 p.m., when he returned to the station (R. 150-154).

After the jury's return to the courtroom, the court denied petitioner's motion to suppress the confession (R. 169). The statement was then read by agent Weiskirch (R. 172-175). In it, petitioner admitted that on December 26, 1950, he drove the Navy truck assigned to him to shop 38 where he assisted in loading the truck with various pieces of navy equipment, and that later, with Quon, he drove out of the Navy Yard to Cavallo's residence where the parts were unloaded into the Cavallo car. Petitioner also stated (R. 174), "I was panicky and wanted to get rid of this stolen Government property which I had carried away and was desperate for a place to dispose of it." Counsel for petitioner again cross-examined Weiskirch in relation to the matters propounded in the hearing before the court (R. 176-191).

After the Government rested its case, petitioner's counsel sought to place him on the stand "for the limited purpose of producing testimony as to the voluntary aspect of the taking of the confession admitted into evidence herein" (R. 194).

The court stated (R. 198):

> * * * of course, if you want to put the defendant on, that is within your rights. But when you put the defendant on, it is not for a special purpose, if you should, but for all purposes of examination. If you want to proceed on that basis, you may, of course, do so.

In its charge to the jury, the trial court instructed (R. 202):

> Notwithstanding the admission into evidence by the Court of this document it is up to you, the jury, to decide whether to accept or reject the truth of the same.

Petitioner did not take the stand before the jury.

ARGUMENT

1. Petitioner contends here, as in his motion for new trial (R. 8) and in the court below (R. 213-214), that he was denied the right to testify in his own behalf before the jury by the trial court's "ruling in effect that a defendant in a criminal trial cannot take the stand in the presence of the jury for the express limited purpose of testifying as to the involuntary aspect of the taking of a con-

fession" (Pet. 14). This argument is wholly without merit.

As the Court of Appeals for the Ninth Circuit noted in its opinion below (R. 221-222), a reading of the record clearly establishes that the trial court went no further than to inform counsel that, if petitioner took the stand, as was his right, he would be subject to cross-examination. This warning was clearly correct. It is well established that, when an accused offers himself as a witness, his credibility may be impeached in the same manner and to the same extent as any other witness. *Sawyer* v. *United States,* 202 U.S. 150, 165-166; *United States* v. *Tandaric,* 152 F. 2d 3 (C.A. 7), certiorari denied, 327 U.S. 786; *Banning* v. *United States,* 130 F. 2d 330 (C.A. 6), certiorari denied, 317 U.S. 695; *Simon* v. *United States,* 123 F. 2d 80 (C.A. 4), certiorari denied, 314 U.S. 694. Petitioner sought to limit his testimony in a manner not permitted by our criminal procedure, and the trial court was protecting his rights in informing him of the consequences of his contemplated action.

Clearly the court's instruction (R. 198) placed with the jury the ultimate determination of the question of the voluntary nature of the confession. And the trial court's finding that the confession was a voluntary one was fully supported by the evidence. (R. 104-134, 156-170).

2. Petitioner also contends (Pet. 17-20) that the verdict, judgment and sentence are a nullity in that he was erroneously found guilty of the mutually inconsistent offenses of embezzlement and theft dealing with the same subject matter and the same transaction. It is clear, however, that, while the indictment and judgment could have been more artistically drawn, the defect did not affect petitioner's substantial rights and did not, as he claims, vitiate the jurisdiction of the District Court. *Crain* v. *United States*, 162 U.S. 625, 634-636. Petitioner was in no way misled by the charge of the indictment. Indeed, he waived the reading of the indictment at arraignment, "consenting that the charge be entered in the words thereof" (R. 15), and concededly never raised the point before the trial court (Pet. 18). Thus, it is apparent that he was fully apprised of the nature of the charge and adequately prepared to defend himself at trial.

The trial judge's charge to the jury was clearly framed with reference to theft. The jury was admonished that in order to convict petitioner, all of the elements thereof must be found present in the evidence (R. 203-204). And there is no question, as petitioner concedes (Pet. 18), as to the sufficiency of the evidence to support the verdict. Petitioner made no objection to the form of the verdict at the time when it could have been changed, the only objection being the general one that it was "contrary to the law and contrary to the evi-

dence" (R. 208). Nor was the point raised in his motion for new trial (R. 6-9).

At most, then, it appears that whatever technical defect there may be in the judgment finding petitioner "guilty as charged and convicted" of stealing and embezzling (R. 5), petitioner's substantial rights were not affected and the defect amounted to harmless error at most. See Rule 52, F. R. Crim. P. Indeed, as to protection from being placed in double jeopardy, petitioner obtained wider protection than if the judgment had been phrased solely in terms of theft. See *Crain* v. *United States, supra,* at p. 636. Certainly, no question affecting jurisdiction is presented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1952.

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